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change WSEY's city of license from Mt. Morris to Oregon, Illinois. Therein, the Commission tentatively concluded that the public interest would be served by adopting such a change.

Although WSEY is the only broadcast station at Mt. Morris, the NPRM recognized that WSEY has never been an operating station, and thus is not considered an existing service for city-of-license purposes. WSEY is not considered an "existing service" for purposes of specifying a new community of license until it begins broadcast service to Mt. Morris. Accordingly, its removal to Oregon would be consistent with Commission policy and precedent as described in Modification to Specify New Community of License, 5 FCC Rcd 7094 (1990) and subsequent proceedings, e.g. Glencoe and LeSueur, Minnesota, 7 FCC Rcd 7651 (1992).

Also, Farm Belt timely filed a petition for reconsideration and/or clarification of the R&O's revised policy regarding expiration of construction permits on January 15, 1999. Therein, Farm Belt requested the Commission to toll the three-year period for construction during the pendency of a rule making proceeding involving an unbuilt construction permit. To date, the Commission has not ruled on Farm Belt's petition for reconsideration.

As noted above, the policy enunciated in the R&O requires every new station to be fully constructed by the expiration date of the construction permit, or the permit will be cancelled, absent certain rare circumstances not present here. In the instant case, there is no certainty that the Commission's processes, including completing the rule making proceeding and acting on an application

for modification of construction permit, let alone Farm Belt's construction of WSEY, will all occur in the limited time before the construction permit's expiration date.¹

Strict adherence to the R&O's policy on construction periods would put Farm Belt into a "Catch-22" situation. Once WSEY begins broadcasting from Mt. Morris, that community will have an "existing service", which may negate one basis of the rule making proposal. On the other hand, if Farm Belt does not construct WSEY, it may lose the WSEY permit. Surely, this is not the situation contemplated by the Commission when it adopted its policy requiring construction to be completed within three years of initial grant.

As Farm Belt pointed out in its petition for reconsideration, delays resulting from the Commission's failure to act promptly in rule making proceedings involving a construction permit should not be held against the permittee. The public interest will be served best when the Commission is permitted to reach a decision in MM Docket 99-64 on the merits. This will be possible only if the Commission grants the relief requested by Farm Belt herein.²

A stay of the applicability of the new policy regarding

¹ Farm Belt has requested expedited action in finalizing the rule making proceeding in its comments supporting the proposal to move WSEY from Mt. Morris to Oregon.

² Farm Belt has become aware of other permits in similar situations, including that of KPXC-FM, Indian Springs, Nevada, which joined with Farm Belt in its petition for reconsideration and John Harvey Rees and Mojave Broadcasting Company who have appealed the Commission's decision to the US Court of Appeals. Although Farm Belt has no direct stake in the outcome of these other permits, the fact that there appears to be a number of permittees in positions similar to Farm Belt's indicates that the matters raised are significant and worthy of prompt attention.

construct permits is warranted. The requirements of Virginia Petroleum Jobbers Ass'n. v Federal Power Commission, 259 F. 2d 921, 925 (DC Cir. 1958), and Station KDEW(AM), DeWitt, Arkansas, 11 FCC Rcd 13683 (1996), obtain here. The necessary showings consist of:

1. The likelihood that the moving party will prevail on the merits.

It is arbitrary and improper for the Commission to apply the three-year limit to construction permits which are the subject of rule making proceedings. The Commission did not address the application of the new policy regarding construction permits to the case presented here, i.e. where Commission delay is the reason the permittee has not constructed its station. As Farm Belt noted in its petition for reconsideration, "If the record reveals that the agency has 'failed to consider an important aspect of the problem' or has 'offered an explanation for its decision that runs counter to the evidence before [it],'" the agency is in violation of the Administrative Procedure Act. California v. FCC, 39 F 3d 919 (9th Cir. 1994). Such is the situation here.

As noted in footnote 2 herein, Farm Belt's position is similar to those of certain other permittees some of whom have appealed the R&O to the Court of Appeals for the Tenth Circuit on this issue.

2. The likelihood that the moving party will be irreparably harmed absent a stay.

Farm Belt demonstrated above that its proposal to modify the FM Table of Allotments by simultaneously moving WSEY from Mt. Morris to Oregon and WOXM from Oregon to Genoa (all in Illinois),

relies upon the fact that WSEY is not an existing service to Mt. Morris. If Farm Belt is forced to begin broadcasting on WSEY as a Mt. Morris station, the Commission may be constrained to deny the rule making proposal, thus irreparably harming Farm Belt.

3. The prospect that others will be harmed if the court grants the stay.

Grant of the stay will harm no one and will, in fact, assist in the move of WOXM to Genoa, which is desired by WOXM's new permittee. As the Commission recognized in its NPRM, the public interest and goals of Section 307(b) of the Communications Act will be furthered by grant of a stay to permit Genoa to obtain its first local transmission service.

4. The public interest in granting the stay.

This factor also argues in favor of grant of a stay. As noted above, resolution of the rule making proceeding on its merits will be an overall benefit; no harm to any person will result from a stay.


These factors also support a waiver of the three-year policy. As an alternative to granting a stay, the Commission may issue a declaratory ruling that Farm Belt will have a reasonable period to complete construction of WSEY after conclusion of the MM Docket 99-64 proceeding and grant of any required application for change of facilities stemming therefrom.

For all the foregoing reasons, the Commission should act promptly and grant the relief requested by Farm Belt herein.

Respectfully Submitted,

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